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11 COMPANY OF AMERICA, INC.

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 DOMINIQUE OSBORNE, on her own
behalf on behalf of a class of similarly
16 situated persons pursuant to F.R.C.P.
23 and 23 U.S.C. § 216, and on behalf of
17 the General Public,

18 Plaintiffs,

19 v.

20 THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a New
21 Jersey Corporation,

22 Defendant.

Case No. 2:10-CV-02465 JFW (CWx)

The Hon. John F. Walter

**DEFENDANT'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER
EXTENDING THE DEADLINE TO
SUBMIT A MOTION FOR
CERTIFICATION**

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Pre-Trial Conference: May 6, 2011
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**DEFENDANT'S MEMO OF Ps & As IN OPPOSITION TO MOTION FOR ORDER
EXTENDING THE DEADLINE TO SUBMIT A MOTION FOR CERTIFICATION**

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1 **I. INTRODUCTION**

2 Plaintiff's Motion For An Extension Of Time To Re-Submit Her Motion For
3 Class Certification ("motion") has already been addressed and **rejected** by the
4 Court, in two separate orders.

5 Plaintiff has already made two attempts to seek permission to resubmit her
6 motion for class certification, after it was stricken by the Court. Plaintiff's current
7 attempt is merely an improper request for reconsideration, without any new facts or
8 law to support the requested relief.

9 However, even if the Court wishes to address Plaintiff's third request for an
10 extension of time to re-file her stricken motion for certification, Plaintiff still has
11 not met the standard required under Fed. R. Civ. Proc. 6(b)(1)(B). While Rule
12 6(b)(1)(B) provides limited grounds for an extension of time to file a motion based
13 on "excusable neglect," Plaintiff's repeated and uncorrected violations of the
14 Court's Scheduling Order, the Judge's Procedures and Schedules, and the local
15 rules are not excusable.

16 Alternatively, Plaintiff seeks dismissal of the 17 opt-in individuals who
17 joined this case. This is simply an attempt to avoid the "first-filed rule," which
18 prevents the filing of a second lawsuit in a new jurisdiction involving similar
19 parties and claims. By seeking dismissal of the 17 opt-ins, Plaintiff's counsel
20 seeks to re-file in a different jurisdiction and get a second chance at seeking class
21 certification. This type of forum shopping should not be permitted.

22 **II. THE COURT HAS ALREADY ADDRESSED AND REJECTED**
23 **PLAINTIFF'S REPEATED REQUESTS TO RE-FILE HER MOTION**
24 **FOR CERTIFICATION AFTER THE 90-DAY DEADLINE SET**
FORTH IN LOCAL RULE 23-3

25 Plaintiff seeks "an extension of time to resubmit her motion for class
26 certification." (Motion, p. 1.) However, Plaintiff made the same request to
27 resubmit her motion for certification on two prior occasions. On both occasions,
28 Plaintiff's request was rejected by the Court.

1 Plaintiff now makes a third request to re-file the same motion for
 2 certification. Plaintiff's current request is no different than her two prior requests.
 3 Thus, the current request should be denied.

4 A. **Plaintiff Previously Made Two Requests Seeking An Extension Of**
 5 **Time To File Her Motion For Reconsideration, Both Of Which**
 6 **Were Rejected By The Court**

7 Plaintiff's deadline for filing a motion for class certification was July 19,
 8 2010. (See Scheduling Order, Docket No. 18, p. 31.) Plaintiff's motion for
 9 certification was filed on the date of the deadline. (Docket No. 23.) Plaintiff's
 10 motion was stricken as defective on July 21, 2010. (Docket No. 29.)

11 After her motion for certification was stricken, Plaintiff filed an *ex parte*
 12 application seeking permission to re-file her motion for certification on July 21,
 13 2010. (See Motion, p. 4 and Plaintiff's *ex parte* application, Docket No. 31.)
 14 Plaintiff's *ex parte* application sought the thing Plaintiff now seeks: an order
 15 allowing relief from this Court's Scheduling Order and the 90-day certification
 16 deadline under Local Rule 23-3. (See Plaintiff's *ex parte* application, Docket No.
 17 31, at p. 1.)

18 Defendant opposed Plaintiff's *ex parte* request. (Defendant's Opposition to
 19 Plaintiff's *ex parte* application, Docket No. 32.) Defendant's opposition was based
 20 on the Court's Scheduling Order as well as Local Rule 23-3. (*Id.* at pp. 3-4.)
 21 Defendant argued that the Court's Scheduling Order expressly stated that
 22 "[m]otions for class certification **shall** be filed in accordance with Local Rule 23-
 23 3." (*Id.*; Scheduling Order, Docket No. 18, p. 31; emphasis added.) Defendant
 24 also argued that Local Rule 23-3 requires a motion for class certification to be filed
 25 "[w]ithin 90 days after service of a pleading purporting to commence a class
 26 action." (Defendant's Opposition to Plaintiff's *ex parte* application, Docket No.
 27 32, p. 4)

1 Based on the Court's Scheduling Order and Local Rule 23-3, Defendant
 2 argued that Plaintiff should not be permitted to re-file her motion for
 3 reconsideration because any subsequent filing would be more than 90 days after
 4 service of the Complaint on April 20, 2010. (Defendant's Opposition to Plaintiff's
 5 *ex parte* application, Docket No. 32, pp. 3-4.)

6 The Court agreed. The Court stated that Plaintiff's request for an extension
 7 of time to re-file the motion for certification was rejected "[f]or the reasons stated
 8 in [D]efendant's opposition." (July 23, 2010 Order, Docket No. 34, p. 1.)

9 Plaintiff made another attempt to re-file her motion for certification on July
 10 21, 2010, without the Court's permission. (Docket No. 30.) Once again, the Court
 11 issued an Order striking Plaintiff's untimely and defective papers. (See July 28,
 12 2010 Order, Docket No. 35.)

13 **B. Plaintiff's Motion Amounts To An Improper Third Request For**
 14 **Reconsideration**

15 Plaintiff now makes a third request for the same relief. The Court should
 16 again deny Plaintiff's request because nothing has changed since the time the
 17 Court rejected Plaintiff's two prior attempts to re-file her motion for certification.

18 While the Court has the inherent power to reconsider and modify its prior
 19 orders, reconsideration is an "extraordinary remedy, to be used sparingly." *See,*
 20 *e.g., Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)
 21 (holding that district court did not abuse its discretion in denying plaintiffs' motion
 22 for reconsideration when plaintiffs had numerous opportunities to make the
 23 argument before the district court ruled on the motion; the court stressed that
 24 reconsideration is an "extraordinary remedy to be used sparingly"). *Accord* 389
 25 *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (motions for
 26 reconsideration "should not be granted absent highly unusual circumstances, unless
 27 the district court is presented with newly discovered evidence, committed clear
 28 error, or if there is an intervening change in the controlling law."); *Rowe ex rel.*

1 *Rowe v. Bankers Life and Cas. Co.*, 572 F. Supp. 2d 1138, 1147 (D. Ariz. 2008)
 2 (“Motions for reconsideration should be granted only in rare circumstances. Mere
 3 disagreement with a previous order is an insufficient basis for reconsideration. Nor
 4 is reconsideration to be used to ask the court to rethink what it has already thought
 5 through.”).

6 The Ninth Circuit requires a motion for reconsideration to set forth new facts
 7 or law to support a request that a court reverse its prior decision. In addition, the
 8 new facts or law must demonstrate a “clear error” or a “manifest injustice.”
 9 Specifically, there are three grounds justifying reconsideration:

- 10 (1) an intervening change in controlling law;
- 11 (2) the availability of new evidence; and
- 12 (3) the need to correct clear error or prevent manifest injustice.

13 *See Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1178-79 (9th Cir. 1998)
 14 (denying motion for reconsideration where plaintiff did not present the district
 15 court with newly discovered evidence, demonstrate that the court committed clear
 16 error or manifest injustice, or show that there had there been an intervening change
 17 in controlling law). Because of the narrow purposes for which they are intended,
 18 motions for reconsideration typically are denied. 11 C. Wright & A. Miller,
 19 *Federal Practice and Procedure* § 2810.1 (2d Ed. 2004).

20 Local Rule 7-18 sets forth similar requirements for seeking reconsideration.
 21 As the rule states, motions for reconsideration are improper absent:

- 22 (1) a material difference in fact or law from that presented to the Court
 23 before such decision that in the exercise of reasonable diligence could not
 24 have been known to the party moving for reconsideration at the time of
 such decision;
- 25 (2) the emergence of new material facts or a change of law occurring after
 the time of such decision; or
- 26 (3) a manifest showing of a failure to consider material facts presented to the
 27 Court before such decision.

28 *Id.* Further, Local Rule 7-18 also states that “[n]o motion for reconsideration shall

1 in any manner repeat any oral or written argument made in support of or in
2 opposition to the original” decision.

3 Here, Plaintiff does not assert that there are material differences in fact or
4 law that could not have been known prior to the two Orders denying her requests to
5 re-file her motion for certification. She also does not argue that there are new facts
6 or a change in law.

7 Instead, Plaintiff merely repeats the same arguments already rejected by the
8 Court. Because Plaintiff asserts the same arguments that were previously
9 considered, the Court should abstain from considering the same arguments for a
10 third time.

11 **III. PLAINTIFF’S REQUEST TO WITHDRAW THE OPT-IN**
12 **CONSENTS IS IMPROPER**

13 If Plaintiff’s request to re-submit her stricken motion for certification is not
14 granted, Plaintiff argues that the Court should allow the 17 opt-in individuals to
15 withdraw their consent to the jurisdiction of this Court. (Motion, pp. 11-12.) In
16 other words, Plaintiff is asking for permission to engage in forum shopping so that
17 the 17 opt-in individuals can try to seek certification in a different jurisdiction
18 since they are unable to seek certification in the present venue. (*Id.*)

19 Plaintiff’s tactics are an unabashed attempt to violate the “first-filed rule.”
20 The “first-filed rule” is intended to prevent forum shopping, promote efficiency,
21 and avoid duplicative litigation. *See, e.g., Inherent.com v. Martindale-Hubbell*,
22 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006) (the purpose of the rule is to promote
23 efficiency and avoid duplicative litigation). *Accord Cedars-Sinai Med. Ctr. v.*
24 *Shalala*, 125 F.3d 765, 769 (9th Cir. 1991) (the first-filed rule allows a court to
25 “transfer, stay, or dismiss the second case in the interest of efficiency and judicial
26 economy”).

1 The first-filed rule applies when a complaint involves the same parties and
 2 issues that have already been raised in a case in another district. *See, e.g., Alltrade,*
 3 *Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (the first-filed may
 4 be invoked “when a complaint involving the same parties and issues has already
 5 been filed in another district”) (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678
 6 F.2d 93, 95 (9th Cir. 1982)). The two actions need not be identical as long as they
 7 are “substantially similar.” *See Inherent.com*, 420 F. Supp. 2d at 1097.

8 Here, the motives for dismissing the 17 opt-in individuals are transparent --
 9 if the 17 opt-in individuals are dismissed, they may be able to avoid being
 10 considered as the “same parties” for purposes of the first-filed rule in a subsequent
 11 case alleging the same claims that have been alleged in the current case. This may
 12 then allow the peripatetic pursuit of a forum that will be more hospitable to a
 13 renewed motion for certification. This result would be directly contrary to the
 14 first-filed rule, which is meant to promote efficiency and avoid duplicative
 15 litigation.¹

16 **IV. PLAINTIFF’S CURRENT REQUEST TO RE-FILE HER MOTION** 17 **FOR CERTIFICATION IS BASED ON INCORRECT** 18 **CONCLUSIONS OF FACT AND LAW**

19 **A. Plaintiff’s Original Motion For Certification Was Deemed To Be** 20 **Never Filed**

21 The gist of Plaintiff’s argument is that she “did timely file her motion for
 22 class certification.” (Motion, pp. 1, 5, 7, 8.) Plaintiff, therefore, believes she
 23 should now be allowed to re-file her motion because her original papers were
 24 timely, although defective. (*Id.*)

25 ¹ A second filing of the same claims in a new forum would also be contrary to the
 26 intent of Local Rule 23-3, which is to expedite a decision on class certification. If
 27 a new lawsuit could be filed in a different district whenever there is a failure to
 28 seek certification within the deadline set under Local Rule 23-3, then Local Rule
 23-3 would be eviscerated. As a practical effect, there would be no deadline to
 seek certification because the same counsel could file the same claims repeatedly
 after any certification deadline expires.

1 However, the numerous defects in Plaintiff's papers caused the papers to be
 2 stricken by the Court. (*See* Docket No. 29.) As Plaintiff's current motion
 3 acknowledges, "[w]hen a document is stricken, it is as if **it was never filed.**"
 4 (Motion, p. 3; emphasis added.) Thus, Plaintiff's motion for certification was **not**
 5 **timely** filed because it is deemed to have **never** been filed.

6 **B. Plaintiff's Filing Defects Were Numerous and Repeated**

7 Plaintiff argues that her motion for certification should not have been
 8 stricken because she made a "good faith attempt to comply with the Court's rules."
 9 (*Id.* at p. 9.) According to Plaintiff, the only defect in her papers was on a single
 10 pleading containing "a single keystroke mistake in reading and typing the correct
 11 hearing time." (*Id.*)

12 Plaintiff mischaracterizes the number of defects in her papers. In addition to
 13 the "single" defect acknowledged by Plaintiff, the stricken motion for certification
 14 suffered from numerous other deficiencies and failures to follow the Court's rules
 15 and the local rules.

16 Specifically, the stricken motion for certification violated the Court's
 17 Scheduling Order requiring that "[t]he title page of all motions must state the Pre-
 18 Trial Conference date and the Trial date." (Scheduling Order, Docket No. 18,
 19 pp. 5, 6.) Plaintiff violated the Scheduling Order by listing an incorrect pre-trial
 20 conference date and trial date on the title page of all 5 of the pleadings filed in
 21 connection with the defective motion for certification. (Docket Nos. 23, 24, 25,
 22 26.) Plaintiff again violated the Scheduling Order when she continued to list an
 23 incorrect pre-trial conference date and trial date on each of the 5 additional
 24 pleadings submitted when Plaintiff re-filed her stricken motion for certification.
 25 (Docket No. 30.) In total, Plaintiff filed at least 11 pleadings, including Plaintiff's
 26 *ex parte* application, containing caption information that is incorrect and in
 27 violation of the Court's Scheduling Order.

1 Plaintiff also had a defective e-filing in connection with her stricken motion
2 for certification by incorrectly filing a [proposed] order. (Docket No. 27.) The
3 Court issued a notice of deficiency regarding the improper e-filing. (*Id.*) The
4 Court then issued a second notice of deficiency regarding the improper hearing
5 time. (Docket No. 28.) The Court then issued its Order striking Plaintiff's motion
6 for certification on July 21, 2010. (Docket No. 29.)

7 Plaintiff's *ex parte* application for relief from her filing defects also
8 contained numerous additional filing defects. Plaintiff disobeyed the *ex parte*
9 requirements listed in the Court's Scheduling Order, by failing to file "a separate
10 proposed motion for the ultimate relief the party is seeking." (*See* Scheduling
11 Order, Docket No. 18, p. 6; *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883
12 F. Supp. 488, 492 (C.D. Cal. 1995).)

13 Plaintiff's *ex parte* application also violated the Scheduling Order with
14 respect to the requirements for applications to extend time. (Scheduling Order,
15 Docket No. 18, pp. 6-7.) As expressly stated in the Scheduling Order,
16 "[a]pplications . . . to extend the time required to file any required document . . .
17 must set forth . . . all dates currently set by the Court in this Order, including the
18 discovery cut-off date, the Pre-Trial Conference date, and the Trial date [and] the
19 new dates proposed by the parties." (Scheduling Order, Docket No. 18, p. 6.)
20 Plaintiff's *ex parte* papers failed to contain any of this required information.
21 (Docket No. 31.)

22 To be sure, Plaintiff's filing errors were not the result of a single mistake --
23 they were the result of numerous failures to follow the requirements of the
24 Scheduling Order with respect to her stricken motion for certification, her
25 resubmitted motion for certification, and her *ex parte* application.

1 **C. The Scheduling Order And Local Rule 23-3 Govern The Deadline**
 2 **To Seek Certification**

3 Plaintiff next argues that her filing errors should be overlooked because she
 4 should not have been required to seek certification within 90 days after service of
 5 the Complaint, as required under Local Rule 23-3. (Motion, p. 11.) According to
 6 Plaintiff, the 90-day deadline does not apply to motions for certification of
 7 collective actions under Section 216(b) of the Fair Labor Standards Act (“FLSA”).
 8 (*Id.*)

9 This argument is disingenuous, at best. When setting proposed pre-trial
 10 deadlines to be considered by the Court, Plaintiff agreed that she would “file a
 11 motion for collective-action certification within the time limits proscribed by Local
 12 Rule 23-3.” (Joint Report of Parties’ Early Meeting of Counsel Pursuant to Fed. R.
 13 Civ. Proc. 26(f), Docket No. 15, p. 8.) The Court then adopted the deadline set
 14 forth in Local Rule 23-3 in its Scheduling Order. (*See* Scheduling Order, Docket
 15 No. 18, p. 1) (establishing that motions for certification “shall be filed in
 16 accordance with Local Rule 23-3”). Thus, Plaintiff expressly agreed to the 90-day
 17 deadline under Local Rule 23-3, which was then incorporated into the Court’s
 18 Scheduling Order. (*Id.*)

19 However, Plaintiff now wants to be excused from the agreed upon deadline
 20 set forth in the Scheduling Order and Local Rule 23-3 “in the interests of justice.”
 21 (Motion, p. 4-5.) Despite her prior agreement to file her motion for certification in
 22 accordance with Local Rule 23-3, Plaintiff now contends that Local Rule 23-3
 23 cannot apply in this case because Plaintiff seeks conditional class certification as a
 24 collective action, rather than ordinary class certification under Fed. R. Civ. Proc.
 25 23. (*See* Motion, p. 11.)²

26 ² Plaintiff is incorrect in implying that Local Rule 23-3 is somehow subservient to
 27 Fed. R. Civ. Proc. 23. It is well settled that local rules of a district court have the
 28 same force and effect as laws of the United States. *Marshall v. Gates*, 44 F. 3d
 722, 724 (9th Cir. 1995) (quoting *United States v. Hvass*, 355 U.S. 570, 575 (1958))

1 Plaintiff's argument is refuted by the express language of Local Rule 23-3.
 2 The plain language of Local Rule 23-3 states that it applies to **any** "class action
 3 other than an action subject to the Private Securities Litigation Reform Act of
 4 1995" (emphasis added.) Unlike actions subject to the Private Securities Litigation
 5 Reform Act of 1995, collective actions under § 216(b) of the FLSA are not
 6 exempted from Local Rule 23-3. Thus, the plain language of Local Rule 23-3 does
 7 not support Plaintiff's position.

8 Further, the goal of early determination of class certification applies to cases
 9 where certification is sought under either Fed. R. Civ. Proc. 23 or FLSA § 216(b).
 10 Class actions under Fed. R. Civ. Proc. 23 are to be decided "[a]t an early
 11 practicable time." Fed. R. Civ. Proc. 23(c)(1)(A). Similarly, collective actions
 12 under FLSA § 216(b) are intended to "facilitate early notice to putative class
 13 members." *See Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 990 (C.D.
 14 Cal. 2006) (collective actions may be conditionally certified prior to the
 15 opportunity to take significant discovery in order to "facilitate early notice").
 16 Thus, the 90-day filing deadline under Local Rule 23-3 clearly serves the purposes
 17 of both Fed. R. Civ. Proc. 23 and FLSA § 216(b), because both statutes favor an
 18 early decision regarding certification.³

19 Plaintiff cites *Grayson v. Kmart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir.
 20 1996) and *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) to

21 and Fed. R. Civ. Proc. 83) ("Local rules are 'laws of the United States,' and are
 22 'valid if ... 'not inconsistent' with the Federal Rules of Civil Procedure.'").

23 ³ It simply makes no sense that a class certification decision under Fed. R. Civ.
 24 Proc. 23 would be subject to a 90-day filing deadline while a class certification
 25 decision under FLSA § 216(b) would be subject to a longer filing deadline. Under
 26 Fed. R. Civ. Proc. 23, class actions include, for example, complex multi-state toxic
 27 tort cases alleging billions of dollars in damages. Plaintiff offers no compelling
 28 explanation why Local Rule 23-3 would apply to such a multi-state toxic tort case
 involving much more evidence and factual investigation, but would not apply to an
 FLSA claim involving much less discovery. If Local Rule 23-3 applies to complex
 Fed. R. Civ. Proc. 23 class actions, there is no reason why the rule should not apply
 here.

1 support her faulty argument that Local Rule 23-3 cannot apply to claims under
 2 FLSA § 216(b) because Fed. R. Civ. Proc. 23 and FLSA § 216(b) are “mutually
 3 exclusive and irreconcilable.” (Motion, p. 11.) However, more recent authorities
 4 have expressly held that FLSA § 216(b) claims are compatible with claims brought
 5 under Fed. R. Civ. Proc. 23 and may proceed in the same action. Thus, recent
 6 authorities hold that Local Rule 23-3 establishes the deadline for seeking
 7 certification for class actions under FLSA § 216(b) and class actions under Fed. R.
 8 Civ. Proc. 23.⁴

9 **D. Plaintiff’s Delays Were Not Caused By Defendant’s Failure To**
 10 **Stipulate To Allow Additional Time For Plaintiff To Re-Submit**
 11 **Her Stricken Motion For Certification**

12 Plaintiff complains that the current motion would be unnecessary if
 13 Defendant had stipulated to allow her to re-submit her stricken motion for
 14 certification after the 90-day deadline set forth in the Scheduling Order and Local
 15 Rule 23-3. (Motion, pp. 7-8.) Plaintiff, therefore, concludes that Defendant is
 16 somehow culpable in her delay in filing the current motion. (Id.)

17 Not so. Given that the deadline for seeking certification was set forth in the
 18 Court’s Scheduling Order and governed by Local Rule 23-3, Defendant did not
 19 have the authority to stipulate to extend the existing deadlines.

20 Plaintiff’s counsel was repeatedly informed by Defendant’s counsel that
 21 Defendant could not stipulate to violate a court order. (Meer Declaration, ¶ 3, Exh.

22 ⁴ See, e.g., *Misra v. DecisionOne Mortgage Co. LLC*, 673 F. Supp. 2d 987, 994
 23 (C.D. Cal. 2008) (“numerous district court opinions in the Ninth Circuit have
 24 permitted FLSA claims and state law claims to proceed in the same action;”
 25 “These cases . . . demonstrate that an opt-out class under Rule 23 is not inherently
 26 incompatible with an FLSA opt-in class.”) (citing *Ellison v. Autozone Inc.*, 2007
 27 WL 2701923 (N.D. Cal. Sept. 13, 2007); *Baas v. Dollar Tree Stores, Inc.*, 2007
 28 WL 2462150 (N.D. Cal. Aug. 29, 2007); *Bamonte v. City of Mesa*, 2007 WL
 2022011 (D. Ariz. July 10, 2007); *Ramirez v. RDO-BOS Farms, LLC*, 2007 WL
 273604 (D. Or. Jan 23, 2007); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D.
 474 (E.D. Cal. 2006); *Breeden v. Benchmark Lending Group, Inc.*, 229 F.R.D. 623
 (N.D. Cal. 2005); *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 898 (C.D.
 Cal. 2005); *Barnett v. Washington Mut. Bank, FA*, 2004 WL 2011462 (N.D. Cal.
 Sept. 9, 2004).

1 “A.”) Such a stipulation would have been ineffective and improper because only
 2 the Court may change the deadlines set forth in the Scheduling Order or Local
 3 Rule 23-3, following a motion filed by the requesting party. *See, e.g.,* Fed. R. Civ.
 4 Proc. 6(b)(1)(B) (stating that only the court may extend deadlines in response to a
 5 “motion made after the time has expired.”).

6 Nevertheless, Defendant’s inability to stipulate had no impact on Plaintiff’s
 7 delay in filing the pending motion. Plaintiff was made aware of Defendant’s
 8 inability to stipulate long before the pending motion was filed. (Meer Declaration,
 9 ¶ 4.) For unidentified reasons, Plaintiff waited two months after her original
 10 motion was stricken to file this motion.

11 **E. There Has Been No Unequal Or Preferential Treatment When**
 12 **Enforcing The Scheduling Order Or Local Rule 23-3**

13 Plaintiff argues that it was improper to strike her defective motion for
 14 certification because Defendant was allowed to supplement an incomplete *pro hac*
 15 *vice* application. (*See* Motion, pp. 2-3.) Plaintiff, therefore, implies that Defendant
 16 was given preferential treatment.

17 This argument is based on an improper comparison of two very different
 18 circumstances. Plaintiff’s stricken motion for certification and subsequent *ex parte*
 19 application contained numerous filing defects that directly violated the Scheduling
 20 Order. In contrast, Defendant’s *pro hac vice* application did not violate any terms
 21 stated in the Scheduling Order. Defendant’s *pro hac vice* application also did not
 22 violate the local rules.⁵

23 Plaintiff’s stricken motion for certification was the result of numerous
 24 incorrect or misleading pleadings. In contrast, Defendant’s *pro hac vice*

25 ⁵ Defendant’s *pro hac vice* application did not contain a “certificate of good
 26 standing” from the jurisdiction where the attorney applicant was licensed to
 27 practice law. However, this certificate is not required under the Local Rules. *See*
 28 Local Rule 83-2.3.1 (requiring only that an applicant be “of good standing” in the
 jurisdiction where the applicant practices, without any requirement to furnish a
 certificate of good standing from the other jurisdiction).

1 application was not incorrect or misleading. Plaintiff's stricken motion for
 2 certification was replete with errors in the papers prepared by Plaintiff's own
 3 counsel. In contrast, Defendant's *pro hac vice* application was dependent upon a
 4 document that needed to be obtained from a court in a different jurisdiction.

5 Plaintiff's stricken motion for certification was subject to a filing deadline
 6 set forth in the Scheduling Order and Local Rule 23-3.⁶ In contrast, Defendant's
 7 *pro hac vice* application was not subject to any filing deadline. Plaintiff's stricken
 8 motion for certification also was a pleading that would have otherwise allowed for
 9 the filing of opposition papers. In contrast, Defendant's *pro hac vice* application
 10 was not subject to any opposition.⁷

11 In any event, Plaintiff does not and cannot claim any prejudice resulting
 12 from the Court's response to Defendant's *pro hac vice* application. While Plaintiff
 13 claims that it was "improper" for the clerk to email Defendant to request a missing
 14 document in connection with the *pro hac vice* application, Plaintiff cannot show
 15 how the email communication on this issue prejudiced her in any way.

16 **V. PLAINTIFF HAS NOT SHOWN "EXCUSABLE NEGLIGENCE" AS**
 17 **ADEQUATE GROUNDS FOR SEEKING AN EXTENSION OF TIME**
 18 **TO MOVE FOR CERTIFICATION**

19 Plaintiff argues that "good cause" exists to allow an extension of time to re-
 20 submit her previously stricken class certification motion based on "excusable
 21 neglect." (Motion, p. 6.)

22
 23
 24 ⁶ Importantly, by the time the Court issued a Notice of Deficiency in response to
 25 Plaintiff's improper motion for certification, the deadline for certification had
 26 passed. (See Motion, p. 3 (conceding that the Notice of Deficiency was issued
 27 after the deadline for certification on July 19, 2010).)

28 ⁷ While it is obvious that Defendant would oppose a motion for certification, it is
 also obvious that Plaintiff would not oppose a *pro hac vice* application. Indeed, a
pro hac vice application can be granted without even permitting any response by
 opposing counsel.

1 Federal Rule of Civil Procedure 6(b)(1)(B) allows for an extension of time
 2 to file a motion where there is excusable neglect on the part of the party seeking
 3 the extension:

4 “When an act may or must be done within a specified time, the court
 5 may, for good cause, extend the time on motion made after the time
 6 has expired if the party failed to act because of excusable neglect.”

6 Fed. R. Civ. Proc. 6(b)(1)(B).

7 However, if a request for an extension is made **after** the time period for
 8 filing expires, a district court’s discretion is more restricted. Courts have carefully
 9 tested a litigant’s claim of excusable neglect and have limited the grounds that are
 10 sufficient for seeking an extension. *See, e.g., In re Veritas Software Corp. Secs.*
 11 *Litig.*, 496 F.3d 962, 973 (9th Cir. 2007) (finding that the “awkward procedural
 12 posture” of a case is not sufficient to show good cause or excusable neglect);
 13 *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996)
 14 (“‘Excusable neglect’ is not easily demonstrated, nor was it intended to be.”)
 15 Thus, the finding of excusable neglect is reserved for extraordinary cases. *Id.*
 16 (“A party cannot easily show ‘excusable neglect,’ and the Court should only find
 17 ‘excusable neglect’ in ‘*extraordinary cases* where injustice would otherwise
 18 result.’”) (emphasis in original); *see also In re Nelson*, 2003 WL 22945657, at *1
 19 (Bankr. N.D. Cal. May 20, 2003) (finding that the court may decline relief even if
 20 plaintiff were to demonstrate excusable neglect; “merely establishing excusable
 21 neglect does not entitle one to relief”).

22 Mere inattentiveness or inadvertent error may be considered inexcusable.
 23 *See, e.g., Mendez v. Knowles*, 556 F.3d 757, 766-767 (9th Cir. 2009) (noting that
 24 “run-of-the-mill inattentiveness by counsel” may be inexcusable). Further,
 25 requests for an extension after a party has waited until the last minute are less
 26 likely to constitute excusable neglect. *See, e.g., Spears v. City of Indianapolis*, 74

1 F.3d 153, 157 (7th Cir. 1996) (“When parties wait until the last second to comply
2 with a deadline, they are playing with fire.”).⁸

3 In *Pioneer Investment Services Co. v. Brunswick Association Ltd.*
4 *Partnership*, 507 U.S. 380 (1993), the Supreme Court specifically set forth the
5 standard for showing excusable neglect,⁹ based on a four-part test, which includes:

- 6 (1) the danger of prejudice to the non-moving party;
7 (2) the length of delay and its potential impact on judicial proceedings;
8 (3) the reason for the delay, including whether it was within the reasonable
9 control of the movant; and
10 (4) whether the moving party’s conduct was in good faith.

11 507 U.S. at 395. Plaintiff cannot show excusable neglect based on any of the
12 *Pioneer* factors, as shown directly below.

13 **A. Defendant Will Be Unduly Prejudiced If Plaintiff Is Allowed To**
14 **Resubmit An Untimely Motion For Certification**

15 Plaintiff argues that enforcing the deadline under Local Rule 23-3 is contrary
16 to the “interests of justice.” (Motion, pp. 4-5.) Plaintiff then argues that the
17 determination of what constitutes inexcusable neglect “is at bottom an equitable
18 one, taking into account all relevant circumstances surrounding the party’s
19 omission.” (*Id.* at p. 6.)

20 At the outset, Plaintiff argues that the 90-day deadline to seek certification
21 under Local Rule 23-3 runs afoul of the “interests of justice” if the application of

22 ⁸ The fact that an error lies with the attorney, and not the attorney’s client, is not
23 dispositive of whether there is excusable neglect. Clients must be held responsible
24 for the omissions of their attorneys, even if the clients are not otherwise culpable
for the error. *Allen v. Murphy*, 194 F.3d 722, 724 (6th Cir. 1999) (“Clients must be
held accountable for the acts and omissions of their chosen counsel.”).

25 ⁹ In *Committee for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 825 n.4 (9th Cir.
26 1996), the Ninth Circuit held that the *Pioneer* standard is applicable to motions
27 under Fed. R. Civ. Proc. 6(b). Specifically, Fed. R. Civ. Proc. 6(b) allows a party to
move the Court for an order extending the time to act “when an act may or must be
done within a specified time” if there is good cause to show that “the party failed
to act because of excusable neglect.” Fed. R. Civ. Proc. 6(b)(1)(B).

1 the rule results in denial of the opportunity to seek certification. (*Id.*) However,
 2 the 90-day deadline under Local Rule 23-3 has consistently been enforced, even
 3 when it serves as the reason for striking class allegations or denying class-wide
 4 relief. *See, e.g., Verner v. Swiss II, LLC*, 2010 WL 99084, at *2 (C.D. Cal. Jan. 6,
 5 2010) (“Because Plaintiff failed to comply with Local Rule 23-3’s ninety-day time
 6 limit for filing motions for class certification, the Court strikes the class allegations
 7 in Plaintiff’s First Amended Complaint.”); *Forrand v. Fed. Exp. Corp.*, 2008 WL
 8 276389, at *1 (N.D. Cal. Jan. 31, 2008) (“Plaintiffs sought to amend the scheduling
 9 order to allow a late motion for class certification to be brought, but Judge Fischer
 10 denied that motion ... and ruled that ‘this case will proceed as an individual action’
 11 because ‘no motion for class certification has been or will be filed.’”).¹⁰

12 Plaintiff next argues that her obligations to comply with the Court’s
 13 Scheduling Order and Local Rule 23-3 are subservient to the issue of whether non-
 14 compliance has caused prejudice to Defendant in this case. (Motion, pp. 6-8.)
 15 Plaintiff contends that Defendant will suffer no prejudice if she is allowed to
 16 resubmit her stricken motion for certification because “Defendant would receive an
 17 incredible advantage in this litigation if Plaintiff’s instant motion is granted.”
 18 (Motion, p. 7.)¹¹

19 Plaintiff is simply wrong. Plaintiff’s logic is that Defendant will “benefit”
 20 from extra time in opposing an untimely motion for certification. (Motion, p. 7.)¹²

21 ¹⁰ When motions for certification are allowed after the expiration of Local Rule 23-
 22 3’s 90-day deadline, the request for an extension of time was brought **before** the
 23 expiration of the 90-day deadline.

24 ¹¹ On its face, Plaintiff’s argument is incredulous. Certainly, Plaintiff would not
 25 seek a result that would allow Defendant to “receive an incredible advantage in this
 26 litigation.” If Plaintiff truly believes that the current motion will result in an
 27 “incredible advantage” for Defendant, then the motion should not have been filed.

28 ¹² Plaintiff’s logic is that a decision to allow her to resubmit her stricken motion for
 certification will inevitably result in Defendant having more time to prepare its
 opposition to a motion that was served on Defendant months beforehand. Yet
 Plaintiff carefully avoids making any representation that she will resubmit the
 same motion if her request for relief is granted. At most, Plaintiff states that she

1 However, Plaintiff ignores the fact that Defendant will have substantially less time
2 to prepare its defense if conditional certification is granted. This is because a
3 decision to allow Plaintiff to submit an untimely motion for certification would not
4 change any of the subsequent pre-trial and trial dates set in this case. Thus,
5 Defendant would actually have significantly less time to prepare a defense to a
6 potential collective action if Plaintiff is granted the relief she now seeks.

7 Specifically, the parties and the Court have set pre-trial and trial dates based
8 on a deadline for filing a motion for certification on July 19, 2010. (Motion, p.
9 10.) If the motion for certification had been timely filed, the discovery cut-off
10 would be approximately 7 months later on March 1, 2011. If Plaintiff is allowed to
11 resubmit her motion for certification 10 days after the hearing on the pending
12 motion, the earliest filing date for the motion for certification would be November
13 1, 2010. The motion would then not be decided until November 29, 2010. This
14 would limit Defendant to only 3 months of discovery after the motion is decided.¹³

15 The other pre-trial and trial dates would also be negatively affected by a late-
16 filing of a motion for certification. Given that the late-filed motion for certification
17 could not be decided any earlier than November 29, 2010, Defendant would have
18 only 3 months to file any subsequent motions, including a motion for
19 decertification, because motions must be filed by February 28, 2011, in order to
20 meet the motion hearing cut-off of March 28, 2011. Defendant also would be
21 prejudiced by being forced into a shotgun trial schedule. Because the untimely
22 motion for certification could not be decided before November 29, 2010,
23 Defendant would be forced to go to trial less than 6 months later on May 24, 2011.

24
25 "does not anticipate making any substantial changes to the motion." (Motion,
p. 7.)

26 ¹³ Similarly, the discovery period would be further limited by the time expended to
27 send notice to potential class members. Even if potential class members are given
minimal notice of 30 days to opt in, then Defendant would only have two months
to complete discovery for a nationwide class of current and former employees.

1 Accordingly, an untimely motion for certification would unduly prejudice
 2 Defendant because Defendant would have less than half the time previously
 3 allocated to take discovery and significantly less time to prepare pre-trial motions
 4 and prepare for trial.

5 **B. The Length Of Delay Will Have A Significant Impact On**
 6 **Subsequent Judicial Proceedings**

7 As shown above, the delay in this case inevitably results in any resubmitted
 8 motion for certification being deemed filed no earlier than November 1, 2010, and
 9 decided no earlier than November 29, 2010. These delays have a significant
 10 impact on all subsequent pre-trial and trial dates.

11 Plaintiff nevertheless argues that “there was no delay” on her part with
 12 respect to her stricken motion for certification and, therefore, there will be no delay
 13 with respect to subsequent judicial proceedings. (Motion, p. 8.) Plaintiff argues
 14 that she filed her stricken motion for certification on the last day permitted and
 15 then resubmitted her stricken motion for certification “only two days outside of the
 16 90-day deadline imposed by Local Rule 23-3.” (Motion, p. 7.) Accordingly,
 17 Plaintiff concludes that the “delay” was merely two days. (Motion, pp. 7-8.)

18 Plaintiff’s analysis is obviously flawed. Under *Pioneer*, the delay in this
 19 case is based on the time that the motion for certification will be **properly** filed
 20 and decided, not the time when the stricken motion for certification was
 21 **defectively** filed. It is entirely irrelevant that Plaintiff claims her stricken motion
 22 for certification was resubmitted only two days after the deadline stated in the
 23 Scheduling Order and Local Rule 23-3.

24 Here, Plaintiff unduly delayed in filing the current motion after learning that
 25 the defective motion for certification had been stricken. If she had been diligent in
 26 pursuing the current motion, it would have been filed in early August, shortly after
 27 Plaintiff’s defective motion for certification was stricken on July 21, 2010, or
 28 shortly after her *ex parte* application was denied on July 23, 2010, or shortly after

1 her resubmitted motion for certification was stricken on July 28, 2010. Plaintiff
 2 offers no reason for why she waited to file the current motion until two months
 3 after her defective motion for certification was first stricken. Notwithstanding that
 4 Plaintiff has failed to offer any reason for the delay, no justifiable reason exists.¹⁴

5 **C. Plaintiff Offers No Justifiable Reason For Her Delay And No**
 6 **Justifiable Reason Exists**

7 Regardless of the length of the delay, Plaintiff argues that she should be
 8 allowed to resubmit her stricken motion for certification despite the defects in her
 9 papers because she displayed a “good faith effort to comply with the Court’s rules
 10 and procedures.” (Motion, p. 8.)

11 However, the grounds for modifying the existing Scheduling Order are very
 12 restrictive. As the Scheduling Order states, “the dates and requirements are firm.”
 13 (Scheduling Order, Docket No. 18, p. 1.) Thus, the Scheduling Order expressly
 14 states that more than mere “**good faith**” is required to change the existing dates
 15 and deadlines. (*Id.*) (emphasis added.) Rather, there must be “**good cause** through
 16 a concrete showing.” (*Id.*) (emphasis added.)

17 Plaintiff does not and cannot establish the requisite good cause for
 18 modifying the Scheduling Order. To change a scheduling order, a party must show
 19 that the existing deadlines could not reasonably be met despite the diligence of the
 20 party seeking the modification. Fed. R. Civ. Proc. 16 Advisory Committee Notes
 21 (1983 Amendment).

22 Plaintiff in this case cannot show an inability to meet the deadlines set forth
 23 in the Scheduling Order. Instead, Plaintiff’s excuse is merely an admitted failure
 24 to follow the local rules when filing her stricken motion for certification. Failure

25 ¹⁴ It is ironic that Plaintiff delayed over two months in filing this motion, yet now
 26 seeks to allow Defendant only three months to prepare all of its pretrial motions
 27 and less than six months to prepare for trial. If Plaintiff contends that there is no
 28 prejudice to Defendant because Defendant can prepare pre-trial motions and
 prepare for trial on a highly expedited schedule, then this highlights why it was
 unreasonable for Plaintiff to take so long to prepare this single pending motion.

1 to follow the local rules is not good cause for modifying the Scheduling Order and
 2 is not excusable neglect. *Pioneer*, 507 U.S. at 392 (“While ‘excusable neglect’ is
 3 an equitable standard, inadvertence, ignorance of the rules, or mistakes construing
 4 the rules do not usually constitute ‘excusable neglect.’”); *Reynolds v. Wagner*, 121
 5 F.3d 716, 716 (9th Cir. 1997) (“It is well settled that ‘inadvertence, ignorance of
 6 the rules, or mistakes construing the rules do not usually constitute excusable’
 7 neglect.”).

8 In *Watson v. Schwarzenegger*, 2009 WL 1956222, at *1 (9th Cir. 2009), the
 9 Ninth Circuit recently held that this Court did not abuse its discretion in denying a
 10 motion for relief from Local Rule 23-3 based on a failure to follow the local rules.
 11 In affirming this Court’s decision, the *Watson* Court explained:

12 The district court did not abuse its discretion in denying Watson’s
 13 motion for relief from Local Rule 23-3 because **Watson’s**
 14 **unfamiliarity with the local rules and unnecessary delay in filing**
 15 **his motion did not constitute excusable neglect.** See Fed.R.Civ.P.
 16 6(b)(1)(B) (requiring a showing of excusable neglect if a motion to
 extend time is made after the time to act has expired); *Pincay v.*
Andrews, 389 F.3d 853, 859 (9th Cir. 2004) (en banc) (stating that
 “a lawyer’s failure to read an applicable rule is one of the least
 compelling excuses that can be offered”).

17 *Id.* at *2 (emphasis added) (affirming the decision of Walter, J.).

18 The reasoning of the Ninth Circuit in *Watson* applies equally here. Plaintiff
 19 has repeatedly displayed unfamiliarity with the local rules when seeking class
 20 certification. Local Rule 7-4 titled “Motion Papers” provides that a “[t]he Court
 21 may decline to consider a motion unless it meets the requirements of [the local
 22 rules]. On the first page of the notice of motion and every other document filed in
 23 connection with any motion, there shall be included, under the title of the
 24 document, the date and time of the motion hearing” See Local Rule 7-4. The
 25 rule is clear: motion papers require the hearing time (and not a good-faith attempt
 26
 27
 28

at listing the hearing time) on the notice of motion and supporting papers.¹⁵

Further, Judge Walter's Procedures and Schedules also explicitly state that "[a]ny documents which counsel attempt to file electronically which are improperly filed will not be accepted by the Court." These rules and procedures were available to Plaintiff, and using the Ninth Circuit's words, "a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered."¹⁶ *Watson*, 2009 WL 1956222, at *2. Accordingly, Plaintiff's "reason" does not constitute excusable neglect.

D. Plaintiff Has Not Demonstrated Good Faith In Connection With The Delays Caused By An Untimely Motion For Certification

Plaintiff's motion contends that "it is beyond dispute that Plaintiff acted in good faith." (Motion, p. 10.) Plaintiff asserts that there cannot be "any possible argument" of a lack of good faith based on "not correctly noticing the hearing time" on her stricken motion for certification. (*Id.* at pp. 10-11.)

Again, Plaintiff conveniently ignores the numerous other filing defects in connection with her stricken motion for certification, her defective *ex parte* application, and her resubmitted motion for certification. While it is plausible that a lawyer might make a single good-faith filing mistake that is quickly corrected, it

¹⁵ Plaintiff has no excuse for listing the incorrect hearing time. Upon viewing Judge Walter's Procedures and Schedules, the first instruction for civil cases is that "[c]ivil motions are heard on: Monday at 1:30 p.m." Judge Walter's Procedures and Schedules, available at <http://www.cacd.uscourts.gov/cacd/judgereq.nsf/2fb080863c88ab47882567c9007fa070/21e1d8bcf994050e88256bbb0053eaf6?OpenDocument>.

¹⁶ Any attempt by Plaintiff to cite *Watson* for the proposition that the Ninth Circuit supports the proposition that the court should freely give leave when justice so requires for "clerical mistakes" is misguided. 2009 WL 1956222, at *2. This discussion in *Watson* merely states that a district court does "not abuse its discretion in allowing the defendants to amend their answer because the defendants' inadvertent admission was due to a clerical error" because Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "[t]he court should freely give leave [to amend pleadings] when justice so requires." *Id.* Rule 15(a)(2), however, also states that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Here, there is no pleading to amend, as it has already been stricken pursuant to the above-discussed local rules and procedures governing this case.

1 is not plausible that a lawyer would repeatedly make the same mistakes over and
 2 over in numerous pleadings before correcting such errors. A litany of mistakes, as
 3 in this case, shows a continuous disrespect for the Court and its procedures rather
 4 than good faith.

5 **VI. CONCLUSION**

6 For the reasons discussed above, Defendant respectfully requests that this
 7 Court deny Plaintiff's motion.

8 The relief sought by Plaintiff has already been addressed and rejected by the
 9 Court. In addition, Plaintiff's alternative request to dismiss the 17 opt-in
 10 individuals is a direct attempt to avoid the "first-filed rule," so that this case can be
 11 re-filed in a different jurisdiction, with a new chance to seek class certification.
 12 Such forum shopping is improper.

13
 14 DATED: September 27, 2010

SEYFARTH SHAW LLP

15
 16 By: /s/ Jon D. Meer
 17 JON D. MEER

18 Attorneys for Defendant
 19 THE PRUDENTIAL INSURANCE
 20 COMPANY OF AMERICA, INC.
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